United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

IBERIAN TANKERS CO.,

Plaintiff-Appellee,

against

GATES CONSTRUCTION CORP.,

Defendant-Appellant.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

The sole issue presented on this appeal is whether the District Court breached its discretion in awarding plaintiff-appellee, Iberian Tankers Company, as owner of the tank vessel "Wapello," prejudgment interest at the rate of 6% per annum.

The Facts

On December 11, 1967 and for some time prior thereto the barge "M 266," together with its attending tugs, the "Dad" and "Nica Theriot," had been engaged in laying a pipeline off Long Beach, Long Island.

The barge "M 266" is 270′ long and 70′ in beam. While laying pipe the barge is secured by eight anchors, two at the bow, two at the stern and two on either side. When the barge is to be moved the anchors are raised, but all with the exception of the bow anchors are permitted to hang over the sides of the barge with their flukes just below the surface of the water.

On the morning of December 11, 1967 wind was blowing from the east at a force of approximately 25 knots, and the seas had built up to a height of from eight to ten feet. Gates Construction Company, who had the contract to lay the pipeline and who were in charge of the operations of the tugs and barge, concluded that the barge should be towed to a place of safety. All of the anchors were raised and the two tugs proceeded to tow the barge, with her anchors draped over her side, to a lee behind Sandy Hook. The barge was towed on hawsers 1800′ in length. The masters and crew of the tugs, all of whom were unlicensed personnel, decided to tow the barge through Sandy Hook Channel although there was no necessity of taking this route as the drafts of the tugs and barge allowed the flotilla to proceed outside the channel. The District Court concluded that the captains of the tugs acted negligently in this regard in that "it was incumbent on the captain and crew of the flotilla to carefully investigate alternative ways of proceeding" but that "they made no such investigation".

The Court further said that the course which they did pursue "was a dangerous procedure with particular danger to the buoys along the way". While proceeding through Sandy Hook Channel those in charge of the tugs caused and allowed the barge to come in contact with and foul one of the two buoys marking the entrance to Sandy Hook Channel. The tugs then towed the buoy three miles off station before the buoy became disengaged from the barge.

On the same morning the tank vessel "Wapello" was approaching Sandy Hook Channel under conditions of continuing decreasing visibility and high seas. Her speed had been reduced from full ahead sea speed to that of maneuvering speed which her pilot and master estimated would give the vessel a speed over the bottom of about seven knots and a speed through the water of about 11 knots. The vessel's navigation was in charge of a Federally licensed New York Harbor pilot. The ship's radar was

on, but due to the height of the waves sea clutter obliterated the echoes on the radarscope for a distance of about one mile. The pilot observed the second set of two buoys marking Sandy Hook Channel and altered course so as to proceed between these two buoys. Moments thereafter he observed a single buoy which he could not identify. The single buoy was, in fact, the remaining buoy marking the entrance to the channel. The pilot, accompanied by the master of the ship, went into the chart room in an attempt to identify the single buoy but before its identity was determined the "Wapello" went aground.

The District Court concluded that Iberian Tankers, as owner of the "Wapello," was at fault in that the vessel under the existing conditions of visibility was proceeding at an immoderate rate of speed, and also concluded that the negligence of Gates Construction Company in causing and permitting the barge "M 266" to drag the buoy three miles off station was a contributing cause of the stranding. (In this connection see *Afran Transport Company* v. *United States,* 435 F.2d 213 [CA 2d 1970] wherein this Court held the United States solely at fault for permitting a buoy to remain off station, thereby causing a tanker to run aground). The Court below held that Iberian Tankers was entitled to recover 50% of its provable damages with both prejudgment and postjudgment interest at 6% per annum.

The Law

The case of *Ore Carriers of Liberia Inc., as owner of the M/V Tyne Ore* v. *Navigen Company, et al.*, 305 F. Supp. 895 (S.D.N.Y. 1969), aff'd 435 F.2d 549, [CA 2d 1970] is dispositive of the issue. The facts are as follows: The "M/V Tyne Ore," while under charter to Navigen Company, struck a crane located on a dock past which the vessel was proceeding to her berth. The plain-

tiff, the owner of the ship, settled the claim with the pier owner and thence commenced suit against the charterer to effect a recovery on the grounds that the charterer had breached the safe port and safe berth warranty of the charter party. The District Court, Charles Metzner, D.J., found that the warranty had been breached, but that the master of the vessel knew of the risk involved and nevertheless proceeded toward the berth designated by the charterer. The Court held that both plaintiff and defendant were equally at fault and awarded the plaintiff 50% of his damages. The question then arose as to whether or not plaintiff was entitled to prejudgment interest. The Court stated, at page 896:

> "[1] The basic rule as to prejudgment interest in admiralty has been stated in The Wright, 109 F.2d 699 (2d Cir. 1940). The award of such interest is a matter of the court's discretion, but this is a legal discretion 'and the award is to be made whenever damages lawfully due are withheld, unless there are exceptional circumstances to justify the refusal.' Id. at 702. Accord, O'Donnell Transp. Co. v. City of New York, 215 F.2d 92 (2d Cir. 1954). The opinion referred to an exception to this rule and said that 'interest should be withheld in collision cases between private vessels until it can be found which party is withholding a balance due * * *.' Id. 109 F.2d at 702. However, the general rule has been applied even in mutual fault collision cases where there has been a stipulation as to damages, Lady Nelson, Ltd. v. Creole Petroleum Corp., 286 F.2d 684 (2d Cir. 1961), or where there is a preponderance of fault on one side, Afran Transport Co. v. The Bergechief, 285 F.2d 119 (2d Cir. 1960)."
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> * * *
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> "[3] Defendants argue that this case is a mutual fault case and therefore the exception to the normal

admiralty rule is applicable. The misconception here, however, flows from categorizing this case on the basis of the court's finding of mutual fault. Defendants overlook the controlling factor calling the exception into play, namely, a collision between two vessels with cross-claims between the respective owners of the vessels. Here one party paid all the damages and the question for the court was whether the other party was liable for all or part of this damage. The situation is precisely analogous to the situation in The Hannah A. Lennen, 77 F.Supp. 471 (D.Del. 1948), a mutual fault collision case in which only one party claimed damages. There the court distinguished The Wright as follows:

'Where only one libel is filed the only uncertainties are those accompanying every admiralty action and every action sounding in tort, viz., the uncertainty of proving liability and the amount of damages. In such cases there is no uncertainty as to the party who should pay all or a portion of the damages if liability can be proven. If interest could not be allowed until the damages are liquidated and the responsibility fixed, it is difficult to see in what admiralty cases of collision interest could ever be discretionary or allowed from a date preceding the decree fixing liability, and the general rule regarding interest in admiralty proceedings would have no force.' Id. at 472."

In affirming, this Court said, at page 551:

"[2] Charterers further argue that the district court abused its discretion in awarding pre-judgment interest on the damages which the court assessed against the charterers amounting to one-half of the total damages sustained by shipowner. *We agree with Judge Metzner, 305 F. Supp. 895, that where the*

only question is whether one party who has paid all damages is entitled to reimbursement, an award of pre-judgment interest is appropriate." (Emphasis added)

See also *The Hannah A. Lennen,* 77 F. Supp. 471 (D.C. Del. 1948):

National Marine Service Inc. v. *H.S. Talley,* 348 F.2d 589 [CA 5th 1965].

CONCLUSION

The District Court did not abuse its discretion in awarding the plaintiff prejudgment interest at the rate of six percent per annum. The appeal should be dismissed with costs.

Respectfully submitted,

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Attorney for [illegible]

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